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No. 55

In the Supreme Court of the United States

OCTOBER TERM, 1932

CESARO SCRO, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

A statement by the District Court of its reasons for overruling one of the grounds upon which the validity of the search warrant was challenged will be found at R. 6. Its charge to the jury appears at R. 12–17. The judgment of the District Court was affirmed by the Circuit Court of Appeals *per curiam* without opinion. (R. 22.)

JURISDICTION

The judgment of the Circuit Court of Appeals was entered January 25, 1932. (R. 23.) A peti-

tion for rehearing was denied February 9, 1932. (R. 23.) The petition for certiorari was filed May 6, 1932, and was granted May 31, 1932. (R. 24.) Jurisdiction to issue the writ is conferred by Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the search warrant was executed within the time prescribed by law.

2. Whether such warrant issued upon probable cause.

STATUTE INVOLVED

Section 11, Title XI, of the Act of June 15, 1917, c. 30, 40 Stat. 217, 229, commonly known as the Espionage Act (U. S. C., Title 18, Sec. 621), provides:

> A search warrant must be executed and returned to the judge or commissioner who issued it within ten days after its date; after the expiration of this time the warrant, unless executed, is void.

STATEMENT

In an information filed in the District Court for the Northern District of New York the petitioner was charged, in the first count, with having possessed, and in the second count, with having sold, intoxicating liquor in violation of the National Prohibition Act. (R. 2–3.) Prior to trial he moved to suppress the evidence obtained in a search

by Federal prohibition officers, pursuant to a search warrant, of premises operated by him as a hotel, on the grounds, among others, that the warrant was invalid because (1) it had not been executed within ten days of its issuance, as required by Section 11, Title XI, of the Act of June 15, 1917, and (2) it had issued without probable cause. (R. 5–9.) The motion was denied. (R. 9.) At the trial the case was submitted to the jury upon a stipulation of facts, subject to petitioner's objection on the grounds stated in the motion to suppress to the use of evidence obtained in the search and seizure. (R. 9–11.) The jury found petitioner guilty as charged in the possession count, but disagreed upon the sale count. Petitioner was sentenced to pay a fine of $500. (R. 17.) The judgment was affirmed by the Circuit Court of Appeals. (R. 23.) This Court granted a writ of certiorari. (R. 24.)

SUMMARY OF ARGUMENT

While it is true that under Section 11, Title XI, of the Espionage Act the failure to execute a search warrant within ten days of its date renders the warrant invalid, we submit that the statute did not preclude the Commissioner from using the first warrant in this case, as he could a printed blank or form, in issuing a *new warrant*. The new warrant would be based upon the same affidavit and would be identical with the first warrant except for the date. The act of the Commissioner in

changing the date and re-issuing the warrant was, for all intents and purposes, the issuing of a new warrant.

The affidavit of Prohibition Agent Dodd alleged a purchase of beer containing more than one-half of one per cent of alcohol by volume. In view of Section 1, Title II, of the National Prohibition Act, c. 85, 41 Stat. 305, 307 (U. S. C., Title 27, Sec. 4), which specifically names "beer" in defining intoxicating liquor, it was unnecessary for the affiant to further allege that he had tested the beer and had found it to contain a forbidden quantity of alcohol. *Johnson* v. *United States,* 46 F. (2d) 7 (C. C. A. 6th); *United States* v. *McGuire,* 300 Fed 98 (N. D. N. Y.). This allegation may therefore be rejected as surplusage. But assuming that it may not be eliminated, we submit that there is no merit in petitioner's contention that the affidavit did not show probable cause for the issuance of the warrant because it failed to show that the agent who purchased and tested the beer was qualified to make such test. This contention is based upon the assumption that to determine the alcoholic content of beer requires a knowledge, training, or experience not possessed by one having only the qualifications of a prohibition enforcement agent. It is a matter of common knowledge that with the use of an instrument known as an ebulliometer any person of ordinary intelligence can ascertain with approximate accuracy the percentage of alcohol in a fluid. The ebulliometer is in general use for testing the alcoholic

content of the radiators of automobiles in freezing weather and requires no more skill in its use than does the gauge commonly used by automobile owners for testing the air pressure of the tires on their cars. Although the manner in which the agent tested the beer is not stated in the affidavit, it appears in the court's charge to the jury that he used an ebulliometer and that a government chemist testified that this was one of the approved methods of determining the alcoholic content of liquor such as beer. It also appears from the court's charge that the agent testified at the trial that he tasted the beer he had purchased, that he was familiar with the taste of beer having percentages of alcoholic content of two and one-half per cent or more and that the beer in question had such an alcoholic content.

Assuming that the affidavit upon which the original warrant issued showed probable cause and that Section 11 of the Espionage Act did not prevent the issuance and execution of the new warrant, the only question which could arise respecting the validity of that warrant would be whether probable cause ceased to exist because of the lapse of twenty-one days before the new warrant issued. The limitation prescribed by Section 11 of ten days within which a warrant must be executed after its issuance was designed to prevent undue delay in the execution of the warrant and to require, after the expiration of the statutory period, a new warrant based upon a new finding by a judge or Commis-

sioner that probable cause then existed in order to justify a search. That limitation was not intended to prescribe ten days as the maximum period within which the condition shown by the affidavit as justifying a search could be presumed to continue. It has been so held, in effect, in a number of cases, cited *infra* pp. 15–17, involving periods ranging from twelve to twenty-one days. No hard and fast rule can be applied in determining whether an unreasonable length of time has elapsed between the event or events relied upon to show probable cause and the making of the affidavit or the issuance and execution of the search warrant. Each case must depend upon its own peculiar facts. The affidavit in the instant case alleged the purchase of beer in a hotel from the person in charge on June 29, 1926. We submit that if this showed probable cause for belief that intoxicating liquor was possessed on the premises on July 6, 1926, when the original warrant issued, it would not be unreasonable to infer that liquor was possessed there three weeks later when the new warrant issued.

ARGUMENT

I

THE SEARCH WARRANT WAS EXECUTED WITHIN THE TIME PRESCRIBED BY LAW

With reference to the time which elapsed between the issuance and execution of the search warrant the following facts were stipulated (R. 10):

> That on or about the sixth day of July, 1926, William Arthur, United States Commissioner at Rome, New York, issued a search warrant based upon an affidavit introduced in evidence in this case, of C. G. Dodd, in which Dodd swore that he made a purchase of beer of the defendant; that on the twenty-seventh day of July, 1926, the said search warrant not having been executed in the interim and ten days from the date of the search warrant having expired, the search warrant was taken by the prohibition agents to whom it was directed back to the commissioner and by him, or by some one in his office under his direction and control, the date of the search warrant was changed from July sixth to July twenty-seventh, 1926, and thus reissued; * * *

The record also contains the following certificate by the Commissioner who issued the warrant (R. 4):

> I hereby certify that the complaint or affidavit, upon which the search warrant was issued in the above-entitled matter, was made before me on the 6th day of July, 1926. That the search warrant was issued on or about said 6th day of July, 1926, but was not executed within the ten days prescribed by statute, and was returned to me by Albert Vandiver, Prohibition Agent in Charge of the Syracuse office requesting that same be reissued or redated, and my docket book shows that same was reissued on the 27th

day of July, 1926, and mailed back to said Vandiver.

Petitioner's contention regarding the proceedings thus shown by the record is that, as the statute (Sec. 11, Title XI, Act of June 15, 1917, *supra*, p. 2) declares that a search warrant which has not been executed within ten days after its date is void, the Commissioner could not lawfully reissue the unexecuted warrant in this case after the lapse of that period.

While it is true that upon the expiration of ten days after its original issue the warrant *as so issued* no longer had any legal effect (*Appell* v. *United States*, 29 F. (2d) 279, 280 (C. C. A. 5th)), we know of no valid reason why the Commissioner could not use it, as he could a printed blank or form, in making out a *new warrant*. As the new warrant would be based upon the same affidavit and would be identical with the first warrant except for the date, the act of the Commissioner in changing the date and reissuing the warrant, was, for all intents and purposes, the issuance of a new warrant.

II

THE SEARCH WARRANT ISSUED UPON PROBABLE CAUSE

The affidavit upon which the search warrant issued was made by one Charles G. Dodd, who was described therein as a "United States Internal Revenue Agent, detailed to act as Prohibition En-

forcement Agent." It contained the following recitals (R. 3–4):

> That he believes the laws of the United States, viz: the National Prohibition Act, are being violated by reason of the facts, to wit: that intoxicating liquors, containing more than one-half of one per cent of alcohol by volume, are being unlawfully possessed for the purpose of sale and distribution, at the premises known as a 2½-story frame hotel on northerly side of main highway leading from Pine Woods to Madison. Said hotel in Bouckville, N. Y., owned and operated by John Doe in said Village of Bouckville, N. Y., and District as aforesaid.
>
> That the grounds of this application and the sources of deponent's said belief are the following facts and circumstances: That on June 29, 1926, deponent personally purchased of a person in charge at said premises, a drink of intoxicating liquor, to wit: beer, containing more than one-half of one per cent of alcohol by volume, for the sum of $.10. That deponent tested the said beer which he took with him and same was found to contain 4.85% of alcohol by volume.
>
> That from the foregoing, deponent has reason to believe and does believe that intoxicating liquors are being possessed on said premises for the purpose of unlawful sale and distribution contrary to the provisions of the National Prohibition Act and against the peace and dignity of the United States of America.

Petitioner asserts that the facts stated in this affidavit were insufficient to show probable cause for the issuance of the warrant because they failed to show that the affiant was qualified to determine that what he had purchased was beer containing more than one-half of one per cent of alcohol by volume.

We believe that it was unnecessary for the affiant to allege that he tested the beer purchased and found that it contained more alcohol than that permitted by law, and that the affidavit may stand without that allegation. Eliminating it, the affidavit is similar to that involved in *Johnson* v. *United States,* 46 F. (2d) 7, in which the Circuit Court of Appeals for the Sixth Circuit held (pp. 8–9):

> It is conceded by appellant that proof of a sale of "whiskey," "wine," "gin," or other of the familiar intoxicants, none of which has ever been known to exist without more than the permissible maximum of alcoholic content, may properly be held to establish a sale forbidden under the National Prohibition Act. Courts will take judicial notice of the intoxicating quality of these beverages although described only by name. Cf. *Albert* v. *U. S.,* 281 F. 511 (C. C. A. 6); *U. S.* v. *Edwards,* 296 F. 512 (D. C. Mich.); *In re Hollywood Cabaret,* 5 F. (2d) 651 (C. C. A. 2); *Fry* v. *U. S.,* 9 F. (2d) 38 (C. C. A. 9); *Weeke* v. *U. S.,* 14 F. (2d) 398 (C. C. A. 8); *Allshouse* v. *U. S.,* 38 F. (2d) 234 (C. C. A. 3);

U. S. v. *Barbini,* 26 F. (2d) 237 (D. C. Cal.); *U. S.* v. *Ghiorsi,* 31 F. (2d) 440 (D. C. Cal.). But it is said that this doctrine does not apply to "beer," citing *Keen* v. *U. S.,* 11 F. (2d) 260 (C. C. A. 8), *Proulx* v. *U. S.,* 32 F. (2d) 760 (C. C. A. 1). The two last-cited cases do hold that the intoxicating nature of a beverage styled "home-brew beer" is not to be inferred from the name alone, notwithstanding the fact that beer is specifically named along with alcohol, brandy, whisky, rum, gin, ale, porter, and wine, in section 1, title 2, of the National Prohibition Act (27 USCA § 4), defining intoxicating liquor. Both cases, however, seem to indicate the opinion that the allegation of a sale of "lager beer," or even "beer without any adjectival modification," would be enough. Whether that may or may not be so as an academic question, we do not deem it necessary to decide. Having alleged the purchase of "beer" in the affidavit and complaint for search warrant, the affiant further avers that "because of the above facts" the National Prohibition Act is being violated in the premises named, and that "on his own knowledge" there then was, upon the premises named, "a certain quantity of intoxicating liquor fit for beverage purposes and containing more than ½ of 1% of alcohol by volume unlawfully acquired, possessed, stored and used in connection with the aforesaid violation of the National Prohibition Act." The affidavit and complaint must be

> read as an entirety and the statements contained therein must be given that reasonable construction which it is obvious was intended by the parties. Construing the allegation of the purchase of "beer" upon the premises, in connection with the allegations of a thereby resulting violation of the National Prohibition Act, and the averment of the possession upon the premises of intoxicating liquor fit for beverage purposes containing more than ½ of 1 per cent, etc., we must conclude that the affiant intended to convey the impression of a purchase of "beer" of a quality which fell within the statutory definition of intoxicating liquor, and that the allegations of the affidavit were sufficient justification for the commissioner's finding of probable cause.

In *United States* v. *McGuire,* 300 Fed. 98 (N. D. N. Y.), an affidavit which appears to have merely stated that the affiant purchased "beer" was held to show probable cause. There is nothing in the opinion to indicate that there was any allegation in the affidavit that the beer contained more than the permitted quantity of alcohol.

See, however, *Berry* v. *United States,* 275 Fed. 680 (C. C. A. 7th).

But even if the allegation of the affidavit which petitioner questions may not be disregarded as surplusage, we submit that his contention is without merit. It is based upon the assumption that one having only the qualifications of an officer charged with the enforcement of the National Prohibition Act would not possess the necessary knowledge,

training, or experience to ascertain the alcoholic content of beer. It is, however, a matter of common knowledge, of which the Commissioner issuing the warrant could take judicial notice, that with the use of an instrument known as an ebulliometer any person of ordinary intelligence can ascertain with approximate accuracy the percentage of alcohol in a fluid. Such instrument is in general use by automobile owners for testing the alcoholic content of the radiators of their cars in freezing weather and requires no more skill to operate than does the gauge commonly used by such owners for testing the air pressure in the tires of their automobiles. While Agent Dodd's affidavit did not specify the manner in which he tested the beer, it appears from the court's charge to the jury that he used an ebulliometer and that a Government chemist testified that this was one of the approved methods of determining the alcoholic contents of liquors such as beer. (R. 13–14.) There is nothing in the record to support petitioner's assertions that the agent misconceived certain elementary principles of chemistry in applying this test.

It also appears from the court's charge to the jury (R. 13) that the prohibition agent tasted the beer he had purchased, that he was familiar with the taste of beer having an alcoholic content of two and one-half per cent or more, and that the beer in question had such an alcoholic content.

We submit that the premise upon which petitioner's argument rests is untenable; that the Commissioner was fully justified in treating Agent Dodd's affidavit as showing that the beer purchased by him contained in excess of the lawful quantity of alcohol, and that the affidavit accordingly stated facts within the knowledge of the affiant which were ample to show probable cause for the issuance of a warrant.

Assuming that the original warrant issued upon probable cause and that Section 11 of the Espionage Act (*supra*, p. 2) did not prevent the issuance and execution of the new warrant, the only doubt which can arise respecting the validity of the new warrant would be whether probable cause had ceased to exist because a period of twenty-one days elapsed between the issuance of the old and the new warrant.[1]

This question is unaffected by the requirement of Section 11 of the Espionage Act that the warrant must be executed within ten days after its issue. This was obviously designed to prevent undue delay in the execution of the warrant and to require, after the expiration of the statutory period,

[1] This question was raised in the trial court on the motion to suppress (R. 7) and is probably sufficiently preserved by the first specification of the assignments of error filed in that court (R. 18–19). While the point was not discussed in the petition for certiorari, we have considered it because of the rule of this Court that it may, at its option, consider a plain error not assigned or specified. (Rule 27.)

a new warrant based upon a new finding by a judge or commissioner that probable cause then existed in order to justify a search. But it has been often held, in effect, that Congress did not intend by this provision to prescribe ten days as the maximum period during which the condition shown by the affidavit as justifying a search could be presumed to continue. Thus, in *United States* v. *McKay*, 2 F. (2d) 257 (Nev.), where an affidavit for a search warrant made twelve days after liquor was alleged to have been sold on the premises was held to show probable cause, the court, in referring to the limitation of Section 11, said (p. 259):

> The absence of such a limitation as to the lapse of time between the purchase of liquor and the making of an affidavit indicates that in the opinion of the Congress this was a matter which should be left to the discretion of the judge or commissioner, who determines whether there is or is not probable cause. There can be no hard and fast rule fixed by courts to fit every such situation, under all circumstances. Each case must depend upon its own facts. The person or persons who are charged with having whisky in their possession, the quantity of liquor, and the place where it is kept, may all be taken into account, as well as the alleged sale, and the lapse of time.

In *United States* v. *Fitzmaurice*, 45 F. (2d) 133, the Circuit Court of Appeals for the Second Circuit, in connection with a period of nineteen days

between the date the liquor referred to in the affidavit was sold and the date the search warrant was executed, said (p. 134):

> We agree that the whisky originally on hand had probably been drunk; if the property to be seized, which the warrant is to "specify" (sections 616, 626, title 18, U. S. Code) must be the identical liquor possessed at the time of the search, the entry was unlawful. We all know, however, that purveyors of liquor replenish their stocks, and it was a fair inference that whoever was maintaining this saloon, would do the same, and that there would be whisky on the premises on December thirteenth, as there had been on November twenty-fourth, though not the same.

In *United States* v. *Callahan,* 17 F. (2d) 937 (M. D. Pa.), the court held that probable cause for the issuance of a search warrant was shown even though thirteen days had passed since the making of the affidavit, citing *Hawker* v. *Queck,* 1 F. (2d) 77 (C. C. A. 3d), certiorari denied, 266 U. S. 621, where a lapse of twenty-one days between the sale which was the basis of the affidavit for a warrant and the issuance of the warrant was held not to affect the validity of the warrant.

A similar period of twenty-one days between the sale of liquor and the issuance of a search warrant was held not to destroy probable cause in *Hefferman* v. *United States,* 50 F. (2d) 554 (C. C. A. 3d).

In *Dandrea* v. *United States*, 7 F. (2d) 861 (C. C. A. 8th), a search warrant was held invalid where a period of forty-three days had elapsed between the purchase of liquor and the making of the affidavit, but the court pointed out that—

> The affidavit does not state that the John Doe, from whom the whisky was said to have been purchased, was the owner or proprietor of the place, or even an employee in charge.

In the instant case the affidavit alleged the purchase of beer in a hotel from the person in charge on June 29, 1926. Assuming that this showed probable cause for belief that intoxicating liquor was possessed on the premises on July 6, 1926, when the original warrant issued, we submit that it would not be unreasonable to infer that liquor was possessed there three weeks later, when the new warrant issued.

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

Respectfully submitted.

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ADDENDUM

No. 55, October Term, 1932

Cesaro Sgro, petitioner

v.

United States

The statement on page 13 of our brief, with reference to the use of the ebulliometer, that:

> Such instrument is in general use by automobile owners for testing the alcoholic content of the radiators of their cars in freezing weather and requires no more skill to operate than does the gauge commonly used by such owners for testing the air pressure in the tires of their automobiles,

was induced, as petitioner in his reply brief surmises, by our having confused the ebulliometer with the hydrometer, both of which instruments are in common use for testing the alcoholic content of fluids. While the statement quoted is inapplicable to the ebulliometer, the erroneous use of the illustration therein given does not affect our argument that a Federal prohibition agent need not possess any special qualification to be able, with the use of an ebulliometer, to ascertain the alcoholic content of beer. The function of the ebulliometer and the

method of using it are thus described in *Clift* v. *United States*, 22 F. (2d) 549, 550 (C. C. A. 6th):

> This is merely a convenient vessel for boiling a liquid. By using it and a specially graduated thermometer, he (the prohibition officer) obtained the boiling temperature, first of water, and then, under the same conditions, of the liquid being tested. The differences in the boiling temperatures, indicating differences in specific gravity, were then translated into percentage of alcohol. This was done by reference to a table or chart purporting merely to state and formulate the scientific knowledge on this subject. We understand the evidence to be that this chart, along with the instrument and the thermometer, were furnished to the witness by the prohibition department and are in general use throughout the country by the representatives of the department for such tests—in other words, that they constitute a commonly recognized standard. * * *

Respectfully submitted.

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